The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery

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NOTES

THE USE OF RULE 37(b) SANCTIONS TO ENFORCE JURISDICTIONAL DISCOVERY

INTRODUCTION

The discovery system\(^1\) outlined in the Federal Rules of Civil Procedure\(^2\) was designed to facilitate arriving at the merits of legal disputes\(^3\) by providing for the fullest possible disclosure of all relevant facts.\(^4\) Discovery rules have been employed tactically, however, to obstruct the judicial process.\(^5\) These abuses frustrate the goal of the

1. Discovery is the process by which a party obtains information and other materials relevant to a pending lawsuit. *Developments in the Law—Discovery.* 74 Harv. L. Rev. 940, 942 (1961) [hereinafter cited as *Developments*]. From a practical standpoint, the discovery process provides for the economical use of judicial resources. *Id.* It eliminates the risk of surprise at trial, reduces the number of controverted issues for which proof must be taken and increases the possibility of pretrial settlement. *Id.* In addition, by bringing about disclosure and presentation of relevant evidence, it exposes fraudulent and groundless claims, thereby leading to judgments more consonant with the weight of the evidence. *Id.* at 944.


4. E.g., United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947); Harlem River Consumers Coop., Inc. v. Associated Grocers, Inc., 54 F.R.D. 551, 553 (S.D.N.Y. 1972). Rule 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the... action... it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). The theory underlying the discovery system is that a broad pre-trial inquiry into the facts results in a greater measure of justice at trial by “transforming the sporting trial-by-surprise into a more reasoned search for truth.” Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1063 (2d Cir. 1979); accord Armstrong, *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments,* 5 F.R.D. 339, 353 (1946); Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation,* 48 Fordham L. Rev. 907, 908 (1980).

Federal Rules "to secure the just, speedy, and inexpensive determination of every action." One such abuse of the discovery process occurs when a defendant challenges the court's jurisdiction over him and then fails to cooperate in discovery directed toward that issue.

Because jurisdictional facts are often known to the defendant and unknown to the plaintiff, the defendant may attempt to avoid the jurisdiction of the court by concealing evidence regarding his activities in the forum. The Federal Rules authorize the court, however, to order a defendant to respond to discovery directed toward any matter related to a defense. A claim that the court lacks personal jurisdiction can be made by entering a motion to dismiss under rule 12(b)(2), Fed. R. Civ. P. 12(b)(2), or by interposing an objection to personal jurisdiction in the responsive pleadings.


7. This challenge is made by entering a motion to dismiss under rule 12(b)(2), Fed. R. Civ. P. 12(b)(2), or by interposing an objection to personal jurisdiction in the responsive pleadings. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1351, at 564 (1969).


11. Fed. R. Civ. P. 37(a). The discovery process is usually set in motion by the parties themselves. Deterrence, supra note 5, at 1035-36. If the party from whom discovery is sought fails to respond adequately to the discovery request, the party seeking discovery may move for a court order to compel a response. Fed. R. Civ. P. 37(a); Rosenberg, supra note 3, at 487. If the court finds that the discovery sought is relevant to the subject matter of the action, unprivileged and not overly burdensome, Fed. R. Civ. P. 26(b), it will order the dilatory party to respond under rule 37(a). Fed. R. Civ. P. 37(a).

jurisdiction is such a defense. If a defendant fails to respond to a discovery order, the court is authorized by rule 37(b) of the Federal Rules to impose sanctions against him. When the information withheld is relevant to the jurisdictional issue, the question arises whether it is appropriate for the court to apply the issue-preclusive sanction of establishing jurisdictional facts as true or the outcome-determinative sanction of entering a default judgment on the issue of liability.


14. Fed. R. Civ. P. 37(b)(2). This rule states in relevant part: "If a party . . . fails to obey an order . . . made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders . . . ." Id. These sanctions are pivotal to the effective functioning of the Federal Rules, see Jones v. Louisiana State Bar Ass'n, 602 F.2d 94, 97 (5th Cir. 1979); Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503-05 & n.23 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978), and of the discovery process in particular. They serve to compel compliance with discovery orders, see United States v. Westinghouse Elec. Corp., 648 F.2d 645, 651-52 (9th Cir. 1981); Vac-Air, Inc. v. John Mohr & Sons, 471 F.2d 231, 234 (7th Cir. 1973), to remedy specific instances of noncompliance with such orders, see Jones v. Louisiana State Bar Ass'n, 602 F.2d 94, 97 (5th Cir. 1979); Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503-05 & n.23 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978), and to prevent a party from benefitting by withholding information sought through discovery, see Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 308 (S.D. Cal. 1981). In addition, the sanctions outlined in rule 37(b) are used to punish noncompliance and to deter potential noncompliance with discovery orders, see National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam), and to vindicate the authority of the court. See EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1226 (7th Cir. 1980); Perry v. Golub, 74 F.R.D. 360, 365 (N.D. Ala. 1976).


The defendant may assert that in utilizing either of these rule 37(b) sanctions, the court has in essence created its own jurisdiction. In order to be valid, exercise of jurisdiction over a non-consenting party must be authorized by Congress. Such authorization can be found in federal statutes or in the Federal Rules, which are promulgated pursuant to the Rules Enabling Act. Rule 4 of the Federal Rules, the principal mechanism by which federal courts exercise their jurisdiction, authorizes a district court to assert personal jurisdiction in accordance with the laws of the state in which the district court is located, or when otherwise authorized by the rules or federal statutes.


18. If a party has consented to jurisdiction, assertion of the court's power over him need not be authorized by rule or statute. 4 C. Wright & A. Miller, supra note 7, § 1062, at 202, see, e.g., Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979) (dictum) (consent by waiver); Adam v. Saenger, 303 U.S. 59, 67-68 (1938) (consent by bringing suit); Hess v. Pawloski, 274 U.S. 352, 356 (1927) (statutory consent implied from use of state's highways).

19. The Constitution empowers Congress to provide for federal courts. U.S. Const. art. I, § 8, cl. 9 ("Congress shall have Power ...[t]o constitute Tribunals inferior to the supreme Court"); id. art. III, § 1 ("The judicial Power ...shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). This power, supplemented by Congress' article I power "[t]o make all Laws which shall be necessary and proper for carrying [it] into Execution," id. art. I, § 8, cl. 18, extends to the prescription of procedural rules, including jurisdictional rules, which govern the workings of those courts. Hanna v. Plumer, 380 U.S. 460, 472 (1965); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); see Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825).


23. Foster, supra note 20, at 11.

24. See Fed. R. Civ. P. 4(e), which reads in part: "Whenever a statute or rule of court of the state in which the district court is held provides (1) for service . . . upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule." Id. This provision was intended to encompass state process law as an alternative device for authorizing the exercise of personal jurisdiction in the district courts. Id. advisory comm. note (1963 amendment): Kaplan, Amendments to the Federal Rules of Civil Procedure, 1961-1963 (1), 77 Harv. L. Rev. 601, 619-23 (1964).

25. See Fed. R. Civ. P. 4(f), which reads in part: "Process . . . may be served anywhere within the territorial limits of the state in which the district court is held,
If the record is devoid of facts necessary to support jurisdiction under rule 4, the defendant will object that entry of a rule 37(b) sanction is an invalid exercise of jurisdiction. In addition, the Rules Enabling Act requires that the rules promulgated under it not "abridge, enlarge or modify [the] substantive right[s]" of litigants. If application of a rule 37(b) sanction in a diversity action makes it possible for a federal court to hear an action that the state court could not, the defendant will claim that his substantive rights have been affected, in violation of the Rules Enabling Act.

and, when authorized . . . by these rules, beyond the territorial limits of that state," Id. The first provision of this rule was devised "so as to permit service of process anywhere within a state in which the district court issuing the process is held and where the state embraces two or more districts." Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444 (1946). Federal standards measure a defendant's amenability to process served pursuant to this provision. See, e.g., Fraley v. Chesapeake & O. Ry., 397 F.2d 1, 4 (3d Cir. 1968); Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 440 n.3 (1st Cir.), cert. denied, 385 U.S. 919 (1966); Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 153-54 (5th Cir. 1954). The second provision, which refers to the rules, was designed "to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries." Fed. R. Civ. P. 4(f) advisory comm. note (1963 amendment).


27. See Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1138, 1139 (5th Cir. 1980), cert. denied, 451 U.S. 1008 (1981). The law is unclear with regard to the power of federal courts to sanction discovery failures when subject matter jurisdiction is lacking. Recently the District of Columbia Circuit reversed a lower court judgment, finding that the district court had erred in assuming that a challenge to subject matter jurisdiction precluded the consideration of discovery sanctions. Ilan-Cat Eng'rs, Ltd. v. Antigua Int'l Bank, 659 F.2d 234, 239 (D.C. Cir. 1981). The court concluded that, with the possible exception of a default judgment, whatever sanctions are appropriate should be imposed regardless of the merits of the defendant's challenge to the court's subject matter jurisdiction. Id. Other courts have suggested, however, that discovery sanctions are inappropriate in the absence of subject matter jurisdiction. Mandel v. United States, 191 F.2d 164, 165-66 & n.6 (3d Cir. 1951), aff'd sub nom. Johansen v. United States, 343 U.S. 427 (1952); Bell v. United States, 31 F.R.D. 32, 36 (D. Kan. 1962); 4A J. Moore, supra note 15, ¶ 37.03[2], at 37-72.


29. See Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963, 1005-06 (1979); cf. Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 Stan. L. Rev. 395, 434 n.224 (1976) (when party not subject to state court's jurisdiction served pursuant to statutes. If the record is devoid of facts necessary to support jurisdiction under rule 4, the defendant will object that entry of a rule 37(b) sanction is an invalid exercise of jurisdiction. In addition, the Rules Enabling Act requires that the rules promulgated under it not "abridge, enlarge or modify [the] substantive right[s]" of litigants. If application of a rule 37(b) sanction in a diversity action makes it possible for a federal court to hear an action that the state court could not, the defendant will claim that his substantive rights have been affected, in violation of the Rules Enabling Act.
Exercise of jurisdiction by a court must also be consistent with the jurisdictional limitations of due process. Due process requires that the relationship between the defendant and the forum be sufficient to justify the court's exercise of jurisdiction. If the record does not disclose sufficient contacts with the forum, the defendant will assert that imposition of a rule 37(b) sanction violates due process.

If rule 37(b) sanctions cannot be used to compel jurisdictional discovery, the district judge will be left in "a quandary in trying to enforce his discovery order," and the plaintiff may be deprived of his only means of establishing his right to have the action heard in that forum. Moreover, unless an alternative forum where sufficient jurisdictional facts are accessible to him is available, the plaintiff may be denied the right to be heard altogether. This Note contends that federal courts have the power to enforce jurisdictional discovery with


30. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); 4 C. Wright & A. Miller, supra note 7, § 1064, at 205-06; see Restatement (Second) of Judgements § 7 comment b (Tent. Draft No. 5, 1978).


35. Unless the plaintiff can meet his burden of proof of jurisdiction, he will be unable to have the merits of the action heard over the defendant's jurisdictional objections. See 5 C. Wright & A. Miller, supra note 7, § 1351, at 567. The issue of personal jurisdiction, which determines the court's power to exercise control over the parties, is usually decided before other matters are reached. Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979); see Northwestern Nat'l Casualty Co. v. Global Moving & Storage, Inc., 523 F.2d 320, 323 (6th Cir. 1976); Pacific Inter-mountain Express Co. v. Hawaii Plastics Corp., 528 F.2d 911, 912 (3d Cir. 1976) (per curiam).
the rule 37(b) sanctions. It first shows that when a defendant enters a motion to dismiss for lack of personal jurisdiction and then fails to respond to discovery relevant to the determination of that motion, he waives his objections to the court’s use of rule 37(b). It is then suggested that application of these sanctions to enforce jurisdictional discovery is contemplated by the Federal Rules and consistent with the jurisdictional limitations of due process. Finally, this Note concludes that the issue-preclusive sanction of establishing jurisdictional facts is preferable to either the contempt or default judgment sanctions authorized by rule 37(b). This sanction is an effective means of remedying jurisdictional discovery failures and, unlike the default judgment sanction, it does not defeat the primary goal of the Federal Rules to provide for the resolution of disputes on their merits, rather than on the basis of procedural defaults.

I. PROPRIETY OF IMPOSING RULE 37(b) SANCTIONS

A. Waiver

When facts necessary to support jurisdiction are not apparent, a defendant is likely to assert the defense that the court lacks jurisdiction over him. The plaintiff is entitled to seek discovery relating to this defense. If the defendant fails to respond to this discovery, the court may find it necessary to employ one of the sanctions outlined in rule 37(b) to compel the defendant to produce the requested information. The defendant will object, however, that because the jurisdictional issue has not yet been resolved, the court lacks power to impose such a sanction. Although a party does not waive his jurisdictional objections when he appears for the purpose of raising those objections, he does waive his objections to the court’s authority to rule on

37. See supra notes 11-13 and accompanying text.
39. See Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1137-38 (5th Cir. 1980), cert. denied, 451 U.S. 1008 (1981); English v. 21st Phoenix Corp., 590 F.2d 723, 727 (8th Cir.), cert. denied, 444 U.S. 832 (1979); Read v. Ulmer, 308 F.2d 915, 917 (5th Cir. 1962) (dictum); cf. Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434, 435 (5th Cir. 1981) (final judgment improper when there has been no showing of proper service).
the jurisdictional issue.\footnote{41} Necessarily, he must also be treated as having waived his objections to the court's authority to issue\footnote{42} and enforce\footnote{43} orders essential to that determination, including orders to produce information relevant to the issues raised by his motion.\footnote{44} The defendant cannot appear, ask the court to act substantively on his behalf, and then challenge the court's authority when the court fails to act in his favor.\footnote{45} By entering a motion to dismiss for lack of personal jurisdiction, the defendant seeks the benefit of the court's protection by asking the court to issue a binding ruling\footnote{46} that he does

\footnote{41} See Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); Atlantic Las Olas, Inc. v. Joyner, 466 F.2d 496, 498 (5th Cir. 1972), cert. denied, 409 U.S. 127 (1973); Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1151 (N.D. Ill. 1979); cf. Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972) (waiver of objections to court's authority to rule on merits by making general appearance to contest merits); Thompson v. United States, 312 F.2d 516, 519-20 (10th Cir. 1962) (waiver of objections to court's authority to rule on merits by moving for summary judgment), cert. denied, 373 U.S. 912 (1963); Savas v. Maria Trading Corp., 285 F.2d 336, 341 (4th Cir. 1960) (waiver of objections to court's authority to rule on merits by appearing to secure relief from personal liability).


\footnote{43} In order to enforce a party's obligation, a court must have the ordinary judicial mechanisms available to it. Silk v. Sieving, 7 F.R.D. 576, 577 (E.D. Pa. 1947). The court has "inherent power" to employ these mechanisms when their use is necessary to the exercise of another power. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (dictum); United States v. Hudson, 11 U.S. 32, 34, 7 Cranch 21, 22-23 (1812). Inherent power is defined as that power which "[i]s necessary to the exercise of all others," Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980), and has been characterized as "governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). This "inherent power" has been incorporated into the Federal Rules in rule 37(b), Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433, 436 (E.D. Pa. 1978), which outlines rational mechanisms for enforcing court-ordered discovery. Note, Standards for Imposition of Discovery Sanctions, 27 Me. L. Rev. 247, 264 (1975) [hereinafter cited as Standards].

\footnote{44} See Lekkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971) (per curiam); Commonwealth Oil Ref. Co. v. Houdry Process Corp., 22 F.R.D. 306, 308 (D.P.R. 1958); Greene v. Oster, 20 F.R.D. 198, 199 (S.D.N.Y. 1957); Silk v. Sieving, 7 F.R.D. 576, 577 (E.D. Pa. 1947). The very fact that the defendant is a party upon whom discovery requests have been served gives rise to an obligation to provide the information sought. See Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980).


\footnote{46} After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made does not have
not have to defend the action in that forum.\textsuperscript{47} If the motion is denied, the defendant will still have the opportunity to argue the merits of his case.\textsuperscript{48}

The defendant has the option of not appearing at all.\textsuperscript{49} If he exercises this option, the court will enter a default judgment against him on the issue of liability.\textsuperscript{50} The defendant can, however, collaterally challenge execution of that judgment on jurisdictional grounds.\textsuperscript{51} His home forum is more likely to be sympathetic to his interests than the forum where the action was brought.\textsuperscript{52} A collateral challenge, therefore, may prove more advantageous to the defendant than a challenge in the forum in which the action was brought. If, despite


\textsuperscript{47} See Read v. Ulmer, 308 F.2d 915, 917 (5th Cir. 1962) (dictum); Hicks v. Holland, 235 F.2d 183, 183 (6th Cir.), \textit{cert. denied}, 352 U.S. 855 (1956); Orange Theatre Corp. v. Rayhersetz Amusement Corp., 139 F.2d 871, 873 (3d Cir.), \textit{cert. denied}, 322 U.S. 740 (1944); Bogar v. Ujlaki, 4 F.R.D. 352, 353 (W.D. Pa. 1945); 5 C. Wright & A. Miller, \textit{supra} note 7, \S 1351, at 567. A dismissal for lack of personal jurisdiction does not prejudice the right of the plaintiff to file another complaint on the same claim in a forum where the court will be able to obtain jurisdiction. Orange Theatre Corp. v. Rayhersetz Amusement Corp., 139 F.2d 871, 875 (3d Cir.), \textit{cert. denied}, 322 U.S. 740 (1944); see Thomas v. Furness (Pac.) Ltd., 171 F.2d 434, 435 (9th Cir. 1948), \textit{cert. denied}, 337 U.S. 960 (1949).


\textsuperscript{49} Baldwin v. Iowa State Traveling Men’s Ass’n, 283 U.S. 522, 525 (1931).

\textsuperscript{50} Fed. R. Civ. P. 55(a), (b)(1). The defendant by his default is treated as having admitted the plaintiff’s well-pleaded allegations of fact and is bound to the same extent as if he had appeared in the suit and contested the allegations of the complaint. E.g., Thomson v. Wooster, 114 U.S. 104, 112-14 (1885); Dunning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978); Nishimatsu Constr. Co. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975).


\textsuperscript{52} The tendency of a forum to be biased towards its own residents was recognized by the framers of the Constitution. See Bank of the United States v. Deveaux, 9 U.S. 61, 87, 5 Cranch 37, 50 (1809); Note, \textit{The Historic Basis of Diversity Jurisdiction}, 41 Harv. L. Rev. 483, 510 (1928).
this advantage, the defendant decides to appear, it may be inferred that he has weighed his options and decided that appearance is the more beneficial course of action. It is therefore not unfair to treat the defendant as having waived his objections to the court's authority to employ rule 37(b) to enforce his obligation to produce information relevant to determination of the issue he has raised.

Although the defendant's appearance does not of itself constitute a waiver of his jurisdictional objections, his subsequent failure to respond to discovery can amount to such a waiver. In *Hammond Packing Co. v. Arkansas*, the Supreme Court recognized the "right of the lawmaking power to create . . . the presumption that refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." The

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53. See Brief for Cross-Respondent at 41, Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 502 (1981). If the defendant has assets within the jurisdiction in which the action is brought, the default judgment rendered for his failure to appear can be levied directly on those assets. See Shaffer v. Heitner, 433 U.S. 186, 210 (1977); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1126-27 (1966). The defendant will not have the opportunity, therefore, to challenge the court's exercise of jurisdiction over him in his home forum. See supra note 51 and accompanying text. He does, however, still benefit by exercising his option to appear. In doing so, he preserves his defenses on the merits of the claim, see supra note 48 and accompanying text, and places the plaintiff in the position of proving that the court has jurisdiction over him. See supra note 34. If the defendant waits until the judgment is entered, his only means of preventing its execution on his assets will be by moving to vacate for lack of personal jurisdiction under rule 60(b)(4). Fed. R. Civ. P. 60(b)(4); see Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1256 (9th Cir. 1980). He will then bear the burden of proving lack of jurisdiction. Jones v. Jones, 217 F.2d 239, 242 (7th Cir. 1954); Ellington, supra note 51, at 184, and will not have an opportunity to contest the merits of the claim. See supra note 51.

54. Cf. Savas v. Maria Trading Corp., 285 F.2d 336, 341 (4th Cir. 1960) (defendant should not be heard to say that court has the power to decide in his favor but no power to rule against him); Marquest Medical Prods., Inc. v. Emde Corp., 496 F. Supp. 1242, 1246 (D. Colo. 1980) (defendant cannot "walk away" from court's jurisdiction having once submitted himself for the presumed advantages that he obtained).

55. See supra note 40 and accompanying text.


58. Id. at 351. In *Hammond*, the Court considered the constitutionality of a state antitrust statute and the validity of certain proceedings conducted under that statute. *Id.* at 330. The statute in question created a presumption of fact as to the lack of merit in a defense asserted by a defendant if he refused to produce evidence that he
Advisory Committee comments to the original rules justified the effect that the preclusive rule 37(b) sanctions have on a party’s right to be heard on the merits of a claim or defense as being consistent with the ruling in *Hammond*. On the basis of the presumption implicit in rule 37(b), therefore, the defendant who has failed to comply with a jurisdictional discovery order can be treated as having waived his right to contest the jurisdictional issue.

The defendant may object that when jurisdictional facts are established pursuant to rule 37(b), the plaintiff is relieved of his burden of proving jurisdiction. Inherent in the presumption that there is a want of merit in the defendant’s claim of lack of personal jurisdiction, however, is the further presumption that the plaintiff could have proved the existence of jurisdiction if the information sought through discovery had not been wrongfully withheld. Furthermore, when facts are peculiarly within one party’s possession, the burden of proof or disproof of those facts is often shifted onto that party. Jurisdictional facts are often within the exclusive possession of the defendant. It is not unfair, therefore, to relieve the plaintiff...
of the burden of proof of those facts when the defendant has denied him access to them.\footnote{A noncomplying party should not be allowed to benefit from his failure to disclose. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 308 (S.D. Cal. 1981); see Charron v. Meaux, 66 F.R.D. 64, 68 (S.D.N.Y. 1975); Black v. Sheraton Corp. of Am., 371 F. Supp. 97, 102 (D.D.C. 1974).}

The defendant will seek to rebut the presumption that the failure to respond to discovery is an attempt to conceal relevant and damaging information.\footnote{See Compagnie des Bauxites de Guinee v. Insurance Co. of N. Am., 651 F.2d 877, 891 (3d Cir.) (Gibbons, J., dissenting in part), cert. granted sub nom. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 502 (1981).} For example, he may argue that his failure to produce the requested information is the result of the burden imposed by the discovery.\footnote{Id.} By the sanction stage, however, the court has already exercised the authority vested in it by the Federal Rules\footnote{Id.} to determine whether the discovery sought is relevant, privileged,\footnote{Id.} unduly burdensome or expensive.\footnote{See Fed. R. Civ. P. 26(c); id. 37(a)(2); see, e.g., Transamerica Computer Co. v. International Bus. Machs. Corp., 573 F.2d 646, 652 (9th Cir. 1978); Baker v. F. & F. Inv., 470 F.2d 778, 781 (2d Cir. 1972), cert. denied, 411 U.S. 566 (1973); Fond du Lac Plaza, Inc. v. Reid, 47 F.R.D. 221, 222 (E.D. Wis. 1969); Amco Eng'g Co. v. Bud Radio, Inc., 38 F.R.D. 51, 53 (N.D. Ohio 1965). In making this determination, the court balances the relative burdens and interests of the parties. Rich v. Martin Marietta Corp., 522 F.2d 333, 343 (10th Cir. 1975); Richlin v. Sigma Design W., Ltd., 88 F.R.D. 634, 640 (E.D. Cal. 1980); Shenker v. Sportelli, 83 F.R.D. 365, 367 (E.D. Pa. 1979); Flour Mills of Am., Inc. v. Pace, 75 F.R.D. 676, 680 (E.D. Okla. 1977).} This determination is made when the court rules on the plaintiff's motion for an order compelling discovery.\footnote{Id.} The court need not reconsider these factors when determining
whether to impose a sanction.\textsuperscript{74} The willfulness, bad faith or fault of the party in connection with the failure is considered, however, in determining which sanction to impose.\textsuperscript{75}

B. The Rules

Assertion of a federal court’s jurisdiction over a non-consenting defendant must be in accordance with rule 4 of the Federal Rules,\textsuperscript{76} which provides for service of process.\textsuperscript{77} If a defendant challenges the exercise of a court’s jurisdiction, there must be a factual showing that

\textsuperscript{74} See Evanson v. Union Oil Co., 85 F.R.D. 274, 277 (D. Minn. 1979), appeal dismissed, 619 F.2d 72 (Emer. Ct. App.), cert. denied, 449 U.S. 832 (1980): Ohio v. Crofters, Inc., 75 F.R.D. 12, 20 (D. Colo. 1977), aff’d in relevant part sub nom. Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 430 U.S. 833 (1978); Independent Prod. Corp. v. Loew’s Inc., 30 F.R.D. 377, 380 (S.D.N.Y. 1962); 4A J. Moore, supra note 15, § 37.0215, at 37-40; 8 C. Wright & A. Miller, supra note 7, § 2289, at 790-91. The sanctions provided by rule 37(b), including the presumption of want of merit, are triggered by a party’s mere failure to comply with court-ordered discovery. See Societe Internationale v. Rogers, 357 U.S. 197, 208 (1958); Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10th Cir.), cert. denied, 439 U.S. 833 (1978); Fed. R. Civ. P. 37 advisory comm. note (1970 amendment). The Supreme Court has agreed, however, to review a sanction order finding personal jurisdiction for a defendant’s failure to produce “extremely voluminous records” at the offices of counsel for the plaintiff when (a) the defendants had offered to produce those documents at their home offices abroad, (b) those documents would not have revealed that the defendants had conducted any activities in the state, and (c) the court had made no finding that the nonresident defendants’ conduct was “willful, contumacious or in bad faith or that they were able to bring records to district.” 50 U.S.L.W. 3322 (Oct. 27, 1981) (question presented in Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 502 (1981) (No. 81-440)). It is unclear what factors the court will consider when ruling on this question. Arguably, factors such as the offer to produce the documents and the contention that the documents withheld would not have revealed damaging information should be considered before the sanction is entered as rebutting the presumption of want of merit. The Court may, however, rule on the extent of willfulness required before a sanction order precluding litigation can be entered. The cross-petitioners have raised the additional issue of whether courts have the power, absent an independent finding of jurisdiction, to order discovery and enter sanction orders for failure to respond to that discovery. Cross Petition for Writ of Certiorari at 19, Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 502 (1981). This issue, however, is not directly presented by the question that the Court has agreed to hear.


\textsuperscript{76} Fed. R. Civ. P. 4(e)-(f).

\textsuperscript{77} See supra notes 22-26 and accompanying text.
the requirements of rule 4 have been met. For example, when a state long-arm statute is used as the mechanism for asserting a federal court's power under rule 4(e), there must be proof that the defendant has been properly served under that statute. If a court enters a rule 37(b) preclusive sanction against a defendant when proof of facts necessary to support jurisdiction under rule 4 are not on the record, that court appears to be using the sanction as a basis for asserting its jurisdiction, thereby exceeding its power.

A court does not create its own jurisdiction, however, merely because the facts that it establishes as true pursuant to rule 37(b) are jurisdictional. Rather, the court exercises its power to determine whether it has jurisdiction over the parties who have appeared before it. Rule 37(b) is a means of finding the facts necessary to implement jurisdictional facts.


79. Fed. R. Civ. P. 4(e); see supra note 24.


81. Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 892 n.4 (3d Cir.) (Gibbons, J., dissenting in part), cert. granted sub nom. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinée, 102 S. Ct. 502 (1981); Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1139 (5th Cir. 1980), cert. denied, 451 U.S. 1008 (1981); see Read v. Ulmer, 308 F.2d 915, 917 (5th Cir. 1963); Jurisdictional Facts, supra note 9, at 547.


the existing statutory bases of jurisdiction embodied in rule 4 when a defendant fails to cooperate in jurisdictional discovery. In Noble v. Union River Logging Railroad, the Supreme Court stated that a finding of "a preliminary fact necessary to be proven to authorize the court to act" is "as conclusively presumed to be correct as [a] finding with respect to any other matter in issue between the parties." In a later decision, Stoll v. Gottlieb, the Court included facts regarding jurisdiction of the person in a list of examples of such preliminary facts. It stated that "a mere finding [of such facts], regardless of actual existence, is sufficient." The court is not exceeding its power, therefore, when it imposes a rule 37(b) sanction establishing jurisdictional facts.

If the requirements of the jurisdictional statute of the state in which the federal court is located can only be met by imposing a rule 37(b) sanction, the federal court may be able to reach a party that the state
court could not. The question then arises whether application of this rule in a diversity action violates the Rules Enabling Act, which requires that the rules promulgated under it govern procedure and not "abridge, enlarge or modify any substantive right." In Hanna v. Plumer, the Supreme Court relied on the test outlined in Sibbach v. Wilson & Co. to determine whether a federal rule was within the scope of the Enabling Act. The Court in Sibbach had stated that "the test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Rule 37(b), which serves to remedy non-compliance with court orders, thereby promoting the efficiency of

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94. Id.; see Rowe, supra note 29, at 1005-06; cf. Goldberg, supra note 29, at 434 n.224 (party not subject to state court's jurisdiction served pursuant to bulge service provision of rule 4(f)): Federal Rule 4(f). supra note 29, at 285 (same).
95. 380 U.S. 460 (1965).
96. 312 U.S. 1, 14 (1941).
97. Hanna v. Plumer, 380 U.S. 460, 464, 470-71 (1965). The question presented in Hanna was whether process had to be served in the manner prescribed by state law in diversity actions or whether process served in accordance with rule 4(d)(1) of the Federal Rules was sufficient. Id. at 461. The Rules of Decision Act requires federal courts to apply state law except when federal law otherwise requires. 28 U.S.C. § 1652 (1976). In Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court, overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), an earlier case interpreting the Act, 304 U.S. at 79-80, held that federal courts were required to apply state decisional law in diversity actions. Id. at 77-78. Later Courts refined this mandate, finding that state law, even with respect to procedural matters, must be applied in diversity actions whenever application of federal law would affect the outcome of the action. See, e.g., Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). In Hanna, however, the Court found that the Rules Enabling Act, and not the Erie doctrine, was the appropriate standard by which to evaluate the "validity and therefore the applicability of a Federal Rule." 380 U.S. at 469-70; Ely, supra note 21, at 718. "The purpose of the Erie doctrine... was never to bottle up federal courts with "outcome-determinative" and "integral-relations" stoppers—when there [is]... a Congressional mandate (the Rules) supported by constitutional authority."
litigation, is therefore within the scope of the Act. Furthermore, in Hanna, the Court suggested that if a rule survived the process of being drafted by the Advisory Committee, approved by the Supreme Court and not vetoed by Congress, it should be presumed to meet the requirements of the Rules Enabling Act.

Moreover, rules that affect a court's power to exercise personal jurisdiction have been upheld as valid. For example, in Mississippi Publishing Corp. v. Murphee, the Court held that the provision of rule 4(f) that authorizes service of process outside of the district in which the federal court is located was within the terms of the Enabling Act. The Court recognized that application of rule 4(f) would "undoubtedly affect [a defendant's] rights" by requiring him to defend in a forum that he might otherwise avoid. The Court concluded, however, that because rule 4(f) "does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate [his] rights," it "is not subject to the prohibition of the Enabling Act." When a court uses rule 37(b) to preclude litigation on the jurisdictional issue, it still decides the merits of the action according to substantive state law. Therefore, imposition of the

101. 380 U.S. at 471; accord Kerney v. Fort Griffin Fandangle Ass'n, 624 F.2d 717, 720 n.5 (5th Cir. 1980).
105. See supra note 25.
106. 326 U.S. at 445.
107. Id. at 446.
108. Id. (emphasis added).
sanction does not abridge the rules of decision by which the parties' rights will be adjudicated.\textsuperscript{110}

The set of decisional rules to be applied, however, may vary because federal courts generally look to the choice-of-law rules of the state in which they are located to determine which state's law to apply in a diversity action.\textsuperscript{111} These rules may differ from state to state.\textsuperscript{112} Therefore, to the extent that rule 37(b) makes it possible for an action to be heard in one federal forum rather than another, a different state's laws may be applied to adjudicate the action.\textsuperscript{113} The effect that applying different laws to the action may have on a party's substantive rights appears to be inconsistent with the requirement of the Rules Enabling Act that the rules promulgated under it not abridge substantive rights.\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{110}] Cf. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 66 n.13 (4th Cir. 1965) ("The federal jurisdictional and venue statutes do not affect the rules of decision by which the parties' rights will be adjudicated: they only determine the forum."); Shapiro, \textit{supra} note 109, at 344 ("[T]he availability of a federal forum will not affect the substantive law to be applied.").
\item[\textsuperscript{113}] See Cavers, \textit{supra}, note 112, at 164; \textit{Rowe, supra} note 29, at 1005-06; cf. \textit{Goldberg, supra} note 29, at 434 n.224 (party not subject to state court's jurisdiction served pursuant to bulge service provision of rule 4(f)): \textit{Federal Rule 4(f), supra} note 29, at 286 (same).
\item[\textsuperscript{114}] Kaplan, \textit{supra} note 24, at 633; \textit{Goldberg, supra} note 29, at 434 n.225; \textit{Vestal, Expanding the Jurisdictional Reach of the Federal Courts: These 1963 Changes in Federal Rule 4, 36 N.Y.U. L. Rev. 1053, 1071 (1963); Federal Rule 4(f), supra} note 29, at 286. A number of commentators have suggested that when an action is heard in a federal court located in a state whose courts lack jurisdiction to hear the action, the federal court should not be constrained to follow the state's choice-of-law rules which, under the circumstances, the state would be powerless to employ. \textit{See, e.g.}, Cavers, \textit{supra} note 112, at 156; Kaplan, \textit{supra} note 24, at 633; \textit{Vestal, supra}, at 1075-76. These commentators suggest that an independent choice-of-law decision should be made in such actions. Kaplan, \textit{supra} note 24, at 633; \textit{Vestal, supra}, at 1075-76. By adopting an independent federal choice-of-law rule, federal courts could avoid the effect on the defendant's substantive rights that results from requiring him to defend in a forum that, but for the availability of rule 37(b), he might otherwise avoid.
\end{enumerate}
\end{footnotesize}
When the Court in *Hanna* suggested that the Federal Rules are presumptively valid, however, it assumed that the grant of power embodied in the Rules Enabling Act was sufficient to sustain a comprehensive set of procedural rules. The Court held that despite the incidental effects that the Federal Rules might have on the resolution of the merits of an action, they are within the scope of the Enabling Act because they satisfy the procedural test outlined in *Sibbach.* Justice Harlan, in his concurrence, questioned this deference accorded to the federal rules by the majority, suggesting a concern that a rule, although "arguably procedural," could be applied in a manner that abridges substantive rights. Whether application of an otherwise valid rule violates the prohibition in the Rules Enabling Act against the abridgment of substantive rights depends on the meaning ascribed to the term "substantive rights." Neither the Court nor Congress has adequately explained this term. Justice Harlan stated that in determining whether to apply a federal rule, courts should consider whether its application would "substantially affect... primary decisions respecting human conduct." Only if a potential defendant had made a prior decision not to respond to all discovery requests would the possibility of being subject to the law of a different forum because of the availability of rule 37(b) cause him to alter his primary conduct—that is, conduct prior to litigation. This speculative and indirect effect of rule 37(b) is hardly the "substantial impact

117. 380 U.S. at 470-71, 473-74; *see supra* notes 95-98 and accompanying text.
119. *Ely,* *supra* note 21, at 720, 727, 729; *see* Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring). Section 2076 of Title 28 of the United States Code, authorizing the Supreme Court to amend the Federal Rules of Evidence, provides that any rules promulgated under it that create, abridge or modify a privilege shall not become effective until approved by an act of Congress. 28 U.S.C. § 2076 (1976). This proviso demonstrates that Congress is reluctant to delegate to the Court the power to create rules that affect substantive rights. *See* Rove, *supra* note 29, at 1007.
120. Westen & Lehman, *supra* note 98, at 361.
124. *See* Hart & Wechsler, *supra* note 112, at 714, distinguishing rules that are relevant at the primary stages of activity from those that become material after
on private primary activity" contemplated by Justice Harlan's test. 125 The only decision that the availability of a rule 37(b) sanction directly affects is the decision whether to respond to a specific discovery request after litigation has commenced. 126 Such a decision is made within the context of litigation and is not "primary activity." 127

Moreover, the Court's prior analysis in Byrd v. Blue Ridge Electric Rural Cooperative, Inc. 128 supports the application of rule 37(b) in a diversity action when the rule operates to allow a federal court to hear an action that the concurrent state court could not hear. The Court indicated that federal practice should be followed in diversity actions if that practice embodies a strong federal policy. 129 A number of years later, in Arrowsmith v. United Press International, 130 the Second Circuit suggested that a federal court would not be required to follow state jurisdictional law in a diversity action if a strong federal policy

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126. See supra note 11.
127. See Hart & Wechsler, supra note 112, at 747; Ely, supra note 21, at 724-25; Westen & Lehman, supra note 98, at 361-63.
129. Id. at 538. The Court found that the strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts should prevail over the goal of achieving uniformity of outcome among state and federal courts. Id. In reaching this conclusion, the Court relied on an earlier decision in which it held that state laws could not alter the "'essential character or function of a federal court.' " Id. at 539 (quoting Herron v. Southern Pac. Co., 283 U.S. 91, 94 (1931)); see Simler v. Conner, 372 U.S. 221, 222 (1963); Iovino v. Waterson, 274 F. 2d 41, 48 (2d Cir. 1959), cert. denied, 362 U.S. 949 (1960). The Hanna decision, which succeeded Byrd, did not mention that state and federal interests should be balanced to determine which law to apply. See Hanna v. Plumer, 380 U.S. 460 (1965). This has lead some commentators to suggest that the balancing approach is no longer valid. See Ely, supra note 21, at 717 n.130; Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 714-15 (1967). But see Redish & Phillips, Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma, 91 Harv. L. Rev. 356, 396-401 (1977) (proposing a refined balancing test). A number of lower courts, however, have continued to apply Byrd. See, e.g., Walko v. Burger Chef Sys., 554 F.2d 1165, 1170 (D.C. Cir. 1977); Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 537 (4th Cir. 1970), cert. denied, 402 U.S. 932 (1971); McDonald v. United Airlines, Inc., 365 F.2d 393, 595 (10th Cir. 1966); Wieser v. Chrysler Motors Corp., 69 F.R.D. 97, 101 (E.D.N.Y. 1975); cf. Baron Tube Co. v. Transp. Ins. Co., 365 F.2d 858, 862 (5th Cir. 1966) (judge-made federal rule); Chayes, Some Further Last Words on Erie: The Bead Game, 87 Harv. L. Rev. 741, 753 (1974) (recognizing the necessity of discerning the state and federal policies at stake in cases involving a choice between state and federal law).
130. 320 F.2d 219 (2d Cir. 1963).
justified the application of a federal standard.\textsuperscript{131} The provision of rule 4(f) that provides for service of process on a third party found within 100 miles of the courthouse\textsuperscript{132} embodies such a policy.\textsuperscript{133} The federal interest in providing a forum for hearing related claims that could not otherwise be heard in one action\textsuperscript{134} would not be served if bulge service was only effective when the requisites for state court jurisdiction were present.\textsuperscript{135} Similarly, the strong federal interests in preventing prejudice to plaintiffs seeking discovery,\textsuperscript{136} promoting efficient litigation\textsuperscript{137} and vindicating the authority of the court\textsuperscript{138} that

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  \item \textsuperscript{131} Id. at 227 (dictum); accord Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 710-11 (4th Cir. 1966); Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64-66 (4th Cir. 1965); 4 C. Wright & A. Miller, supra note 7, § 1075, at 315; see Kaplan, supra note 24, at 631-32. The majority in Arrowsmith concluded that the Erie doctrine “would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction . . . in an ordinary diversity case although the state court would not,” 320 F.2d at 226, but found that “in the absence of an overriding federal interest intimated by Congress or its delegate,” state jurisdictional law should be observed. Id. at 227. The court noted that no federal policy of similar strength or constitutional basis as that upheld in Byrd was presented by the case before it. Id. at 230.
  \item \textsuperscript{132} Fed. R. Civ. P. 4(f).
  \item \textsuperscript{136} E.g., Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981); Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 504 & n.23 (4th Cir. 1977), cert. denied, 434 U.S. 1030 (1978).
  \item \textsuperscript{138} EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1226 (7th Cir.
underlie rule 37(b) justify the use of sanctions even when, by virtue of their imposition, a federal court can assert its jurisdiction when the state court could not.\textsuperscript{139}

C. Due Process Considerations

The Fifth Circuit has suggested that entry of rule 37(b) sanctions against a party who is not otherwise within the court's jurisdiction exceeds constitutional due process limitations.\textsuperscript{140} The due process limitations that are applicable to the federal courts are derived from the fifth amendment.\textsuperscript{141} An analysis of the due process requirements of the fifth amendment,\textsuperscript{142} however, does not support the Fifth Circuit's view. Due process limits the power of the court to exercise its authority over a defendant.\textsuperscript{143} A court can assert jurisdiction over any person having a sufficient, purposeful relationship\textsuperscript{144} with the forum of the sovereign that created it.\textsuperscript{145} When federal court jurisdic-
tion is in question, the sovereign is the federal government; the forum is the entire United States. Thus, as long as a defendant has contacts with the United States, the fifth amendment does not prevent a federal court from exercising its jurisdiction over that defendant.

Some courts have suggested that the minimum contacts limitations developed in connection with the fourteenth amendment are constitutionally binding on the federal courts. These con-


150. The “minimum contacts” test, which defines the limits of state court jurisdiction, was first formulated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Court authorized suit over a nonresident defendant when that defendant had “certain minimum contacts with [the state] such that the maintenance of the suit [did] not offend ‘traditional notions of fair play and substantial justice.’ ” Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

151. U.S. Const. amend. XIV. The fourteenth amendment provides in part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” Id.

152. Sprow v. Hartford Ins. Co., 594 F.2d 412, 416-17 (5th Cir. 1979); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 n.2 (7th Cir. 1975); Travis v.
straints, however, serve "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Fourteenth amendment inquiry is only relevant to federal court jurisdiction when Congress has decided, as in rule 4(e), that process shall be served in accordance with state law. Federal courts exercising their jurisdiction pursuant to such a provision follow state court jurisdictional analysis. Consideration of fourteenth amendment limitations is then required to determine the constitutionality of the applicable state law but not the constitutional limitations on the jurisdiction of the federal court. Congress's incorporation of state jurisdictional law is discretionary, not constitutionally required.

Anthes Imperial, Ltd., 473 F.2d 515, 529-30 (8th Cir. 1973); Coleman v. American Export Isbrandtsen Lines, 405 F.2d 250, 252 (2d Cir. 1965).


Fourteenth amendment due process also mandates consideration of the reasonableness or fairness of requiring a nonresident to defend in a particular forum. Federal courts adopting this aspect of fourteenth amendment due process analysis to define the limitations on their own jurisdiction, however, are imposing limitations on their power that developed in connection with territorially limited state court jurisdiction. The fifth amendment imposes no such impediment on the reach of the federal courts with respect to parties with sufficient contacts with the United States.

Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 442 (1946); United States v. Union P. R.R., 98 U.S. 569, 603-04 (1878); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Dists. Pty. Ltd., 647 F.2d 200, 203 & n.4 (D.C. Cir. 1981); Fitzsimmons v. Barton, 589 F.2d 330, 334 (7th Cir. 1979); A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, Supporting Memorandum B 191, 194 (Official Draft 1965); Foster, supra note 20, at 38-39; see supra note 149 and accompanying text. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); see Rush v. Savchuk, 444 U.S. 320, 329 (1980); Shaffer v. Heitner, 433 U.S. 186, 216 (1977); McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957); International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). An important consideration in analyzing the reasonableness of the court’s exercise of jurisdiction is whether “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297. Implicit in the reasonableness requirement, however, “is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute . . . the plaintiff’s interest in obtaining convenient and effective relief . . . the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” Id. at 292 (citations omitted).

E.g., Fraley v. Chesapeake & O. Ry., 397 F.2d 1, 3 (3d Cir. 1968); Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 154-55 (5th Cir. 1954); Scott v. Middle E. Airlines Co., 240 F. Supp. 1, 3-4 (S.D.N.Y. 1965).


Stafford v. Briggs, 444 U.S. 527, 533-54 (1980) (Stewart, J., dissenting); see Leroy v. Great W. United Corp., 443 U.S. 173, 191-92 (1979) (White, J., dissenting); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974). One court has determined that the fairness component of due process relates to the fairness of the exercise of power by a particular sovereign, not the fairness of requiring the defendant to litigate
The fifth amendment does, however, limit the jurisdiction of federal courts over defendants who are not within the United States.165 This limitation is analogous to the fourteenth amendment limitations imposed on the states.166 A defendant must have a relationship with the United States that is sufficient to justify compelling him to comply with the orders of its courts.167 Thus, exercise of jurisdiction over a foreign defendant on the basis of facts established pursuant to a rule 37(b) sanction may be inconsistent with the requirements of the fifth amendment if no such relationship exists.

It is not unconstitutional, however, to condition rights and benefits on compliance with procedural requirements.168 Federal courts im-

in a distant forum, Fitzsimmons v. Barton, 589 F.2d 330, 334 (7th Cir. 1979), and that the latter are venue, rather than jurisdictional, concerns. Id. at 334-35; Federal Rule 4(f), supra note 29, at 294-95. Notice and the opportunity to be heard are the fundamental requirements of fifth amendment due process. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). Notice must be reasonably calculated to inform the defendant that his rights are in issue so that he will have the opportunity to "choose for himself whether to appear or default, acquiesce or contest." Id. at 314. The rules provide numerous opportunities for a party to be made aware that his conduct in discovery is in issue. E.g., Fed. R. Civ. P. 6(d) (all motions and notice of the hearings of such motions or affidavits supporting such motions must be served on the other party to the suit); id. 37(a) (notice of motion for order compelling discovery must be served on the party against whom the order is sought); id. 55(b)(2) (notice of default must be served on a party before entry of a default judgment against him). In addition, courts consider, among other factors, whether the defendant has been made fully aware that his rights are in issue and has had an adequate opportunity to object to the discovery order and to explain his failure to comply with it before entering a sanction order against him. E.g., National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1213 (8th Cir.), cert. denied, 102 S. Ct. 512 and 102 S. Ct. 641 (1981).


168. O'Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Calif. L. Rev. 443, 445 (1966); Deterrence, supra note 5, at 1054; see Adam v. Saenger, 303 U.S. 59, 67-68 (1938); cf. Poulos v. New Hampshire, 345 U.S. 395, 405-08 (1953) (first amendment rights can be regulated by requiring public speaker to obtain license); Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82, 95 (3d Cir. 1977) (opportunity to be heard in rule-making proceedings can be conditioned on disclosure of technical information); Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 286 (S.D.N.Y.), aff'd, 445 U.S. 955 (1980) (free communication can be restricted by
pliedly condition the right to make an appearance for the limited purpose of objecting to jurisdiction on cooperation in discovery directed toward that issue. The mechanisms of rule 37(b) must be available to remedy failures to comply with this condition, even when the defendant is in the forum for a limited purpose. The rule is not unconstitutional merely because the sanction of establishing jurisdictional facts may indirectly affect a foreign defendant's due process rights by requiring him to defend the action. A regulation may incidentally infringe constitutional rights provided that, as applied, it has a sufficient connection with important state interests to justify the infringement. Rule 37(b), when applied to enforce jurisdictional discovery orders entered against foreign defendants, has a sufficient connection with the "fundamental interests of the federal courts in the conduct of their own business and the maintenance of the integrity of their own procedures" to outweigh its incidental effect on the constitutional rights of the defendants.

II. THE APPROPRIATE SANCTIONS FOR ENFORCEMENT OF JURISDICTIONAL DISCOVERY ORDERS

Rule 37(b) authorizes the trial judge to make such orders "as are just" with regard to a party's failure to comply with discovery. The provisions limiting coordinated contributions and expenditures under public funding program).

169. See Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1151 (N.D. Ill. 1979); supra notes 11-13 and accompanying text. "[A] party may be denied access to any judicial process because he [has] failed to fulfill all the necessary conditions for its invocation." Deterrence, supra note 5, at 1054; see Beaufort Concrete Co. v. Atlantic States Constr. Co., 352 F.2d 460, 462-63 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966).

170. See supra note 43.

171. Cf. Speiser v. Randall, 357 U.S. 513, 527 (1958) (distinguishing attempt to protect interest within sphere of government concern, which necessarily has indirect effect on constitutional rights, from attempt to restrict constitutional rights); Adam v. Saenger, 303 U.S. 59, 67-68 (1938) (treating plaintiff as having submitted himself to the jurisdiction of the court for all purposes because he voluntarily appeared in the original action).


range of sanctions available and the discretionary standard outlined for their imposition provide the trial judge with sufficient flexibility to tailor the sanction to the particular facts in each case. The imposition of sanctions, therefore, can be consistent with the goal of the rules to provide for the determination of cases on their individual merits.

175. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); Griffin v. Aluminum Co. of Am., 564 F.2d 1171, 1172 (5th Cir. 1977) (per curiam); Kropp v. Ziebarth, 557 F.2d 142, 146 (8th Cir. 1977).

176. E.g., Liew v. Breen, 640 F.2d 1046, 1050 (9th Cir. 1981); EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1226 (7th Cir. 1980); Griffin v. Aluminum Co. of Am., 564 F.2d 1171, 1172 (5th Cir. 1977) (per curiam). In reviewing sanction orders, appellate courts are concerned with whether the trial judge abused his discretion in entering the order and not with whether they would have entered the same sanction. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam); Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977). The district court in which the action is litigated is in a far better position than the appellate court to determine which sanctions are appropriate. ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1087-88 (1979) (Powell, Stewart & Rehnquist, JJ., dissenting from denial of cert.); Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981). The standards that control the exercise of the trial court’s discretion are not altogether clear. See Compagnie des Bauxites de Guinee v. Insurance Co. of N. Am., 651 F.2d 877, 884-85 (3d Cir.), cert. granted sub nom. Compagnie des Bauxites de Guinee, 103 S. Ct. 502 (1981); Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 281 (1971). They should be related, however, to the reasons that the decision was committed to the trial court’s discretion in the first instance. United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981). Thus, “the fundamental [aim] of the adjudicatory process, the purposes of discovery, the policy underlying procedure in general and discovery in particular, . . . remedial congruence, and the possible effects of the individual sanctions” on the interests of the movant and the recusant party, and its own interest in the administration of justice should guide the court in ruling on a motion for sanctions. Note, Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37(b), 29 Case W. Res. L. Rev. 603, 626 (1979) (footnotes omitted) [hereinafter cited as Goal-Oriented Mission].


It is well established that contempt is an appropriate sanction for a party's failure to obey a court order when jurisdiction is unclear.\textsuperscript{180} Fines for contempt are most effective when they are imposed on an accruing basis until the defendant complies with the ordered discovery.\textsuperscript{181} The contempt sanction thus benefits the plaintiff by encouraging the defendant to respond to his discovery request.\textsuperscript{182} The plaintiff is still faced, however, with potential prejudice resulting from the delay prior to compliance.\textsuperscript{183}

In addition, sanctioning discovery failures with contempt fines reintroduces the "sporting theory of justice"\textsuperscript{184} into litigation.\textsuperscript{185} Lenient sanctions "encourage recalcitrance by litigants with something to hide."\textsuperscript{186} By withholding vital information from the other side in violation of a discovery order, the defendant may prevent discovery

\textsuperscript{180} Jurisdictional Facts, supra note 9, at 547-48; e.g., United States v. UMW, 330 U.S. 258, 293 (1947); United States v. Shipp, 203 U.S. 563, 573 (1906); see Walker v. City of Birmingham, 388 U.S. 307, 314 (1967).


\textsuperscript{184} This approach to litigation was criticized by Roscoe Pound in an address to the American Bar Association, The Causes of Popular Dissatisfaction with the Administration of Justice (Aug. 26, 1906), reprinted in 35 F.R.D. 273, 281 (1964). "[W]e take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference . . . . [T]his approach] leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport." Id.


not only of the information, but also of its very existence.\textsuperscript{187} If the defendant’s motion to dismiss is granted, the plaintiff will have no further opportunity to discover that information has been withheld.\textsuperscript{188} Even if the existence of the withheld information is subsequently discovered, the defendant would merely be subject to a fine.\textsuperscript{189} The defendant may weigh his options and find it more beneficial not to produce the requested information. The rulemakers sought to eliminate such a “sporting” approach to litigation when they formulated the Federal Rules.\textsuperscript{190}

\textbf{B. Default Judgments}

The default judgment sanction, which denies the defendant his right to be heard on the merits of the action, is too severe when applied to enforce jurisdictional discovery.\textsuperscript{191} Because the jurisdictional facts sought often have no bearing on the issue of liability,\textsuperscript{192} there is no basis for presuming that the defendant could not present a

\textsuperscript{188} The jurisdictional determination is generally the threshold determination of the action. See supra note 35.
\textsuperscript{189} Perry v. Golub, 74 F.R.D. 360, 366 (N.D. Ala. 1976); G-K Properties v. Redevelopment Agency, 409 F. Supp. 955, 959 (N.D. Cal. 1976), aff'd, 577 F.2d 645 (9th Cir. 1978); see United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 315 (N.M. 1980) (applying state equivalent of rule 37(b)), appeal dismissed and cert. denied, 451 U.S. 901 (1981). This sanction, although not employed with any degree of regularity, does serve as a further tool for compelling compliance. Goal-Oriented Mission, supra note 176, at 625 n.132. One commentator has suggested that discovery orders should not be enforced through contempt orders because a conclusive finding on the issue in favor of the party seeking the discovery is more effective. Brautigam, Constitutional Challenges to the Contempt Power. 60 Geo. L.J. 1513, 1522 n.57 (1972).
valid defense on the merits of the claim. In addition, issuing a default judgment when the defendant's appearance and failure to comply with discovery have been limited to the jurisdictional issue may violate due process; the sanction is likely to be harsher than is reasonably necessary to remedy the prejudice caused by the failure and to promote the efficient resolution of the litigation.

Furthermore, default judgment sanctions defeat the goal of the Federal Rules to provide for the resolution of disputes on their merits.

320, 323 (6th Cir. 1976); Pacific Intermountain Express Co. v. Hawaii Plastics Corp., 528 F.2d 911, 912 (3d Cir. 1976) (per curiam).

193. Cf. Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 520-21 (4th Cir. 1977) (default judgment inappropriate when information withheld would not have been decisive on the issue of liability), cert. denied, 434 U.S. 1020 (1978); Halverson v. Campbell Soup Co., 374 F.2d 810, 812 (7th Cir. 1967) (sanction precluding introduction of evidence inappropriate when discovery was not directed at obtaining the evidence). Courts have upheld the extreme sanctions of dismissed and default even when the discovery withheld clearly would not have been dispositive of the issue of liability. See Paine, Webber, Jackson & Curtis, Inc. v. Immobiliaria Melia de P.R., Inc., 543 F.2d 3, 6 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. denied, 379 U.S. 912 (1965); United Nuclear Corp. v. General Atomic Co., 629 F.2d 231, 316 (N.M. 1980), appeal dismissed and cert. denied, 451 U.S. 901 (1981). In these cases the discovery denied was at least relevant to the issue of liability. The facts sought through jurisdictional discovery, however, often have no bearing on the substantive issues in the case. See Hales v. First Appalachian Corp., 494 F. Supp. 330, 332-33 (N.D. Ala. 1980); Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1151 (N.D. Ill. 1979). Sanctions limited to the issue before the court have been upheld. Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 883-85 (3d Cir.), cert. granted sub nom. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 502 (1981); English v. 21st Phoenix Corp., 590 F.2d 723, 728 (8th Cir.), cert. denied, 444 U.S. 832 (1979).

194. In order to meet the due process requirement, the courts have restricted themselves to exercising "the least possible power adequate to the end proposed." Shillitani v. United States, 384 U.S. 364, 371 (1966) (quoting Anderson v. Dunn, 19 U.S. 93, 105, 6 Wheat 204, 231 (1821)); accord In re Michael, 326 U.S. 224, 227 (1945); cf. Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254, 256 (1964) (legislation).


197. See, e.g., Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 668 (2d Cir. 1980); Edgar v. Slaughter, 548 F.2d 770, 772-73 (8th Cir. 1977). Default judgment sanctions have been upheld, however, by courts finding that the sanction was a necessary mechanism for deterring noncompliance by potential litigants, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); Phillips v. Insurance Co. of N. Am., 633 F.2d 1165, 1168 (5th Cir. 1981);
rather than on the basis of procedural defaults. Use of the sanction also often fails to achieve the goal of attaining the efficient disposition of cases. Because trial judges are reluctant to preclude litigation on the merits of a dispute, they often extend the time for compliance with discovery orders or condition the sanction on further noncompliance when confronted with a motion for a default judgment sanction. Similarly, appellate court judges often reverse default judgment sanctions and remand the actions for a determination on the merits. Therefore, often neither the goal of promoting the efficiency of the litigation, nor the goal of reaching the merits of the dispute are achieved through sanctioning a defendant by entering a default judgment against him.

C. Establishing the Facts

The issue-preclusive sanction of taking designated facts as established can be tailored to remedy the specific prejudice caused to the plaintiff by the defendant's noncompliance. Thus, in accordance with the requirements of due process, the means employed will be no harsher than is reasonably necessary to achieve the purposes for which

Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de P.R., Inc., 543 F.2d 3, 6 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977), and for protecting the rights of potential litigants competing for scarce judicial resources. Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1332 (9th Cir. 1981); Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 668 (2d Cir. 1980); Affanato v. Merrill Bros., 547 F.2d 138, 140 (1st Cir. 1977). The constitutionality of using sanctions for the purposes of benefiting or influencing the conduct of litigants other than those involved in the litigation, however, has been questioned. See Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503-04 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); Deterrence, supra note 5, at 1052-54.


199. See supra note 6 and accompanying text.

200. E.g., Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 668 (2d Cir. 1980); Affanato v. Merrill Bros., 547 F.2d 138, 140 (1st Cir. 1977); Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257, 270 (9th Cir. 1964), cert. denied, 380 U.S. 956 (1965); W. Glaser, Pretrial Discovery and the Adversary System 185 (1968); Kaminsky, supra note 4, at 984; Renfrew, supra note 5, at 277.

201. W. Glaser, supra note 200, at 155: Developments, supra note 1, at 991.


the sanction is imposed. The court even eliminates the benefit that the defendant may have gained through delaying discovery and thus causing the plaintiff to be inadequately prepared at trial.

The issue-preclusive sanctions are particularly effective when jurisdictional information has been withheld. One of the purposes of rule 37(b) is to move litigation from its frozen state when party-controlled discovery has broken down. Until jurisdiction over the parties is established, a court normally will not hear the merits of the action. By precluding litigation on the jurisdictional issue, the court can proceed to the merits of the dispute despite the defendant’s failure to comply with jurisdictional discovery. This sanction thus furthers the aim of the Federal Rules to adjudicate claims on their merits.

CONCLUSION

Effective discovery sanctions are essential to the fair and efficient administration of the judicial process. If courts do not employ the sanctions outlined in rule 37(b) to enforce jurisdictional discovery, defendants could paralyze litigation by raising jurisdictional objections and then refusing to provide the court with sufficient information to rule on the validity of those objections. Plaintiffs without a


210. See supra note 34.

viable alternative forum would be denied an opportunity to present their claims. The defendant has the opportunity to show that jurisdiction is lacking. His refusal to produce information relevant to his defense strongly suggests that the information withheld is damaging to his case. The rule 37(b) sanction of establishing jurisdictional facts is a fair and effective means of remedying this abuse without subverting the fundamental goal of the judicial process to provide for a fair hearing on the merits of every action.

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